

Summary of Partition Task Force's Discussion at the August 4, 2017 Meeting

Attendance: Judith Welch Wegner, Co-Chair; Starkey Sharp, Co-Chair; Faith Rivers James (by telephone); Paul Stam; C. Thomas Steele, Jr. (by telephone); Floyd M. Lewis; Bly Hall; David C. Unwin; Joshua Lanier, North Carolina Bar Association.

Location: Stam Law Firm, PLLC, 510 W. Williams Street, Apex, North Carolina.

I. Various Partition Issues

The Partition Task Force (PTF) discussed the idea of reaching out to property owners and informing them about deferred property tax provisions, issues regarding tenancy in common ownership, and partition law in general. The PTF discussed asking the Real Property Section of the North Carolina Bar Association, Legal Aid of North Carolina, and the Land Loss Prevention Project if one or more of them would be interested in conducting this outreach.

The PTF reached a consensus that all statutes (e.g. judicial sales, rules of civil procedure, quiet title actions) relating to partition law should be coordinated and consistent. The PTF also agreed that it would clean up existing statutory language as it worked on the substantive issues.

The PTF discussed the idea of a streamlined procedure for low-value property and noted that the Uniform Partition of Heirs Property Act somewhat addresses this issue.

The PTF discussed the *in personam* and *in rem* tax foreclosure procedures.

The PTF agreed to discuss issues relating to timber and mineral sales at a future meeting.

The PTF decided not to pursue the idea of recommending legislation to establish a center to assist with certain costs in partition acts (e.g. appraisals, genealogical research).

The PTF requested that staff investigate whether the current law that only one commissioner should be appointed for a partition sale is clear. The PTF discussed clarifying the law if the current law is not clear.

The PTF discussed the fact that some wealthy individuals abuse the Medicaid eligibility rules regarding tenancy in common interests and requested that staff inquire into whether these rules are based on federal law or state law.

II. Thirteen Issues Raised by Mr. Stam

The PTF discussed the following thirteen issues raised by Mr. Stam:

(1) Authorize the clerk to issue a writ of possession in a partition in kind action. The PTF reached consensus to pursue this idea. The PTF requested that staff research a bill draft on this issue that had been requested by Mr. Stam.

(2) Treat a partition sale as a nontaxable exchange similar to the treatment under Sections 1031 and 1033 of the Internal Revenue Code. The PTF reached consensus to refer this issue to the Revenue Laws Study Committee and requested that staff investigate whether a change in state law could affect the application of federal income tax law. The PTF requested proposed language on this issue.

(3) Authorize the clerk, upon motion, to order that the occupants of a residential property allow a real estate agent to show the property. The PTF reached consensus on this issue.

(4) Authorize the petitioner to choose not to join or notice the spouses of the heirs because their interests are inchoate and remote. The PTF discussed whether this issue has constitutional implications. The PTF discussed amending G.S. 29-30 to provide that a spouse of an heir could not take a life estate interest in property sold in a partition sale. G.S. 29-30(a) provides:

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.

(a) In lieu of the intestate share provided in G.S. 29-14 or G.S. 29-21, or of the elective share provided in G.S. 30-3.1, the surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share shall be entitled to take as the surviving spouse's intestate share or elective share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:

- (1) Has waived the surviving spouse's rights by joining with the other spouse in a conveyance thereof, or
- (2) Has released or quitclaimed the surviving spouse's interest therein in accordance with G.S. 52-10, or
- (3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or
- (4) Is otherwise not legally entitled to the election provided in this section.

(5) Provide the presumption that attorneys' fees incurred for the common benefit should be awarded. The PTF reached consensus on this issue and noted the need for research on case law that elaborates on the meaning of "common benefit".

(6) Clarify the law so that the clerk, upon motion, shall reimburse a cotenant for property taxes paid during the past 10 years at the legal rate of interest. The PTF reached consensus on this issue.

(7) Remove the issue of electronic notice from the PTF's consideration. The general opinion was that the issue was too controversial at this point to include as part of this docket. The PTF discussed the recent veto of House Bill 205 and the controversy surrounding this issue. The PTF

requested that Floyd Lewis consider the possibility of raising this issue before the Uniform Law Commission. The PTF flagged this issue.

(8) Provide that a local government, at no additional cost, shall send a copy of a property tax bill to any person listed on the property who gives the person's email address. The PTF reached a consensus that this issue should be referred to the Revenue Laws Study Committee.

(9) Codify, but do not change, current law on ouster. Mr. Stam withdrew this issue, because he felt that the *Atlantic Coast Properties, Inc. v. Saunders* case was clear. See *Atlantic Coast Properties, Inc. v. Saunders*, ___, N.C. App. ___, 777 S.E.2d 292 (2015), *aff'd per curiam*, 368 N.C. 776, 783 S.E.2d 733 (2016). However, the PTF, including Mr. Stam, decided to continue to examine the issue of ouster.

(10) Provide that a sole occupant shall not be awarded for carrying costs unless those carrying costs exceeded the value of the rent, in which case the rent shall be treated as an offset. The PTF reached consensus on this issue and noted that greater specificity in the statutes might be useful.

(11) Provide an optional statutory short-form tenancy-in-common agreement. The PTF reached a consensus to refer this issue to the Real Property Section of the North Carolina Bar Association to see if it was interested in developing such a form.

(12) Recommend legislation to establish a group to reach out to property owners to inform them about deferred property tax provisions. In its discussion, the PTF combined this issue with its broader outreach group idea, which is described above.

(13) Codify some or all of the 2009 Formal Ethics Opinion 8, *Service as Commissioner After Representing Party to Partition Proceeding* (adopted Jan. 21, 2011). The PTF decided to look at this issue further.

III. Uniform Partition of Heirs Property Act

Section 2 (Definitions). The PTF decided to revisit the definition of "heirs property" and discussed the issue of what percentage of partition actions would fall under this definition and, consequently, under the Uniform Partition of Heirs Property Act ("the Uniform Act"). Mr. Stam noted that, of the 100 or so partitions he had done, all but about six or seven post-divorce partitions would have qualified as heirs property. In answer to a question about the 20% measure, Dean James replied that it was derived from the Internal Revenue Service substantiality test.

Section 3 (Applicability; Relation to Other Law). The PTF discussed the merits of having two partition procedures versus one partition procedure. It was noted that the requirement for a court to determine whether property was heirs property would be an additional court appearance and that a statement in the petition might avoid that.

Section 4 (Service; Notice by Posting). The PTF discussed whether the sign requirement should be limited to partition sales. The PTF also discussed whether the clerk should have

discretion in imposing the sign requirement and whether the sign should be required only upon motion. However, the PTF considered that adding this extra step could add expense. The PTF also considered that Georgia law provides that the sign shall be posted "in the right of way adjacent to the property". See Ga. Code Ann. § 44-6-182. The PTF discussed the possibility of using similar language, "in the nearest right of way to the property", to account for the fact that some property is landlocked. Finally, the PTF considered that some signs are not sturdy and that perhaps the sturdiness of the sign should be statutorily addressed. The PTF flagged this section for further discussion.

Section 5 (Commissioners). The PTF discussed the 2009 North Carolina State Bar Formal Ethics Opinion 8, *Service as Commissioner After Representing Party to Partition Proceeding* (adopted Jan. 21, 2011).¹ The PTF requested staff to obtain the opinion and include its requirements in the chart comparing the Uniform Act with Chapter 46 of the General Statutes. The PTF discussed whether these guidelines should be incorporated into Section 5 of the Uniform Act and decided to ask the clerks of court and the Real Property Section of the North Carolina Bar Association for their comments on this issue.

The PTF also requested that staff research whether any states have elaborated on the meaning of "disinterested". Finally, the PTF discussed the authority of the clerk to set the compensation of commissioners. See G.S. 46-7.1.

Section 6 (Determination of Value). The PTF discussed the fact that an appraisal is an opinion and is not scientific. The PTF also considered if an appraisal could yield a lower price than if the property was sold in a private sale. The PTF requested that staff ask the clerks of court: In what percentage of partition by sale cases, is there a petition to revoke based on inadequate value pursuant to G.S. 46-28.1(a)(2)c.? The PTF considered that a cotenant who did not file a petition to revoke could still be unhappy with the sale price. The PTF also requested that staff draft a document comparing the timelines of the current partition statute and the Uniform Act. The PTF flagged this section for further discussion.

¹ The ethics opinion provides the following guidelines on when an attorney can serve as a commissioner: (1) An attorney representing a person with an interest in the property may serve as a commissioner for a partition sale, provided the attorney determines that the attorney can serve fairly and impartially and the attorney obtains written informed consent from the client to withdraw from representing the client; (2) An attorney representing a person with an interest in the property shall not serve as a commissioner for a partition in kind; and (3) An attorney who formerly represented one of the parties in a separate but related partition proceeding but does not represent any of the parties in the current partition proceeding may serve as a commissioner for a partition sale or a partition in kind, provided the attorney determines that the attorney can serve fairly and impartially. (The ethics opinion also includes other guidelines on related issues.) See also Judith Welch Wegner, *Fresh Thoughts on an Ancient Remedy: Updating North Carolina's Real Property Partition Laws*, pp. 22-24 (comparing the ethics opinion to proposals made by the 2009 Partition Sales Study Committee).

Section 7 (Cotenant Buyout). The PTF discussed the fact that buying out a cotenant can be accomplished in a private transaction without a statutory procedure. The PTF flagged this section for further discussion.

Section 8 (Partition Alternatives). The PTF discussed the fact that under both the Uniform Act and under current law, there is a presumption in favor of a partition in kind. The PTF, however, noted that in certain circumstances, it is clear that a partition in kind is not practicable. The PTF did not favor allocating part of the property to unknown or unlocatable heirs in a partition in kind, as provided by Section 8(d) of the Uniform Act and G.S. 46-13; having titled cleared by the partition proceeding, these heirs would lose the property to a tax foreclosure.

Section 9 (Considerations for Partition in Kind). The PTF considered whether including noneconomic factors would be more equitable. The PTF discussed cases from other states that held that a court, in determining whether to partition in kind or by sale, may consider noneconomic interests. *See Ark Land Co. v. Harper*, 215 W.Va. 331, 338, 599 S.E.2d 754, 761 (W.Va. 2004) ("Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale."); *Zimmerman v. Marsh*, 365 S.C. 383, 388, 618 S.E.2d 898, 901 (S.C. 2005) ("[W]e find that equitable considerations such as the length of ownership and sentimental attachment to the property may be considered[.]").

Paul Stam and Tom Steele expressed opposition to including consideration of noneconomic factors. Dean Wegner and Dean James noted that the Uniform Act's inclusion of those factors related only to the question of partition in kind or by sale, that although partition statutes, including ours, state a preference for in-kind partitions, courts are moving to a preference in practice for partitions by sale, and that the Uniform Act drafters were trying to restore greater force to the preference.

The PTF also examined the language in G.S. 46-22(a) that provides that a court shall order a partition sale only if it finds that a partition in kind would cause "substantial injury" to "any" of the parties. The PTF also examined the language in G.S. 46-22(b) that provides that in determining whether a partition in kind would cause "substantial injury", the court shall consider whether the fair market value of each cotenant's share in a partition in kind would be "materially less" than the amount each cotenant would receive from a partition sale. The PTF requested that staff research the meaning of "substantial injury", "materially less", and whether North Carolina case law addressed the difference between individual and collective injury in this context. The PTF flagged this section for further discussion.

Section 10 (Open-Market Sale, Sealed Bids, or Auction). The PTF compared the Uniform Act's open-market sale procedure with the private sale procedure under current law. The PTF discussed the possibility of specifically providing in the open-market sale procedure that the property be advertised on the Multiple Listing Service (MLS) website and also whether "open-market sale" should be defined.

Section 11 (Report of Open-Market Sale). The PTF noted that although the open-market sale procedure does not include an upset bid procedure, Section 11 of the Uniform Act provides that a

broker must report to the court an offer to purchase the property for at least the value determined by the court. The PTF requested that staff ask the clerks what percentage of partition by sale cases involves the filing of a notice of upset bid.

IV. Conclusion

The PTF confirmed that its next meeting would be on Friday, August 25, 2017, from 10:00 a.m. to 1:00 p.m., at the Stam Law Firm, PLLC, 510 W. Williams Street, Apex, North Carolina.